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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1770

MILTON SILVERMAN and SAM NORBER,
Petitioners,
vs
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statutes and Constitutional Provisions Involved	3
Statement of the Case	7
Reasons for Granting the Writ	17
Conclusion	41
Appendices	
A. Notice of Appeal	43
B. Opinion of the Court of Appeals	45
C. Order Denying Application for Rehearing	67
D. Affidavit in Support of Application for Search Warrant	68
E. Search Warrant	72
F. Order Staying Issuance of Mandate	73

TABLE OF AUTHORITIES

Cases

Aguilar v. Texas, 378 U.S. 108 (1964)	30
Alford v. U.S., 282 U.S. 687 (1931)	25
Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972)	39
Barber v. Page, 390 U.S. 719 (1968)	35
Barber v. Wingo, 407 U.S. 514 (1972)	39

Page

Berger v. U.S., 295 U.S. 78 (1935) 25

Brookhart v. Janis, 384 U.S. 1 (1966) 35

Brown v. U.S., 411 U.S. 223 (1973) 29

Brown v. Walker, 161 U.S. 597 (1896) 26

Bruton v. U.S., 391 U.S. 123 (1968) 35

Carlson v. U.S., 187 F.2d 366 (8th Cir. 1951) 34

Chambers v. Mississippi, 410 U.S. 284 (1973) 26, 32, 33, 35

Corey v. U.S., 305 F.2d 232 Cert. Den. 371 U.S. 956 (1962) 28

Curtis v. U.S., 354 U.S. 926 (1957) 34

DeMarco v. U.S. — U.S. — (73-5684 Dec. 3-18-74) 27

Dickey v. Florida, 398 U.S. 30 (1970) 38, 39

Edmondson v. U.S., 402 F.2d 809 (10th Cir. 1968) 29

Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972) 35

Giglio v. U.S., 405 U.S. 150 (1972) 24, 27

Goings v. U.S., 377 F.2d 753 (8th Cir. 1967) 35

Harlow v. U.S., 301 F.2d 261 (5th Cir. 1962) 37

Hodges v. U.S., 408 F.2d 543 (8th Cir. 1969) 38

Holman v. Washington, 364 F.2d 618 (5th Cir. 1966) 35

Hoopengavner v. U.S., 270 F.2d 465 (6th Cir. 1959) 37

Hoskins v. Wainwright, — F.2d — (5th Cir. 1973) 40

Johnson v. U.S., 318 U.S. 189 (1943) 26

Page

Johnson v. U.S., 347 F.2d 803 (CADC 1965) 25

Johnson v. Zerbst, 304 U.S. 458 (1938) 39

Jones v. U.S., 362 U.S. 257 (1969) 28, 29

Klopfor v. North Carolina, 386 U.S. 213 (1967) .. 38

Krotkiewicz v. U.S., 19 F.2d 421 (6th Cir. 1927) .. 26

McKissick v. U.S., 379 F.2d 754 (5th Cir. 1967) .. 35

Michaelson v. U.S., 335 U.S. 469 (1948) 33

Mooney v. Holohan, 294 U.S. 103 (1935) 25

Moore v. Arizona, 414 U.S. 25 (1973) 40

Napue v. Illinois, 360 U.S. 264 (1959) 24, 25, 27

United States v. Simon, 225 F.2d 260 (2nd Cir. 1955) 28

United States v. Spector, 102 F. Supp. 75, Rev'd. other grounds 193 F.2d 1202 (9th Cir. 1951)... 26

United States ex. rel. Stukes v. Shovlin, 464 F.2d 1211 (3rd Cir. 1972) 39

United States v. Ventresca, 380 U.S. 102 (1965) .. 31

United States v. Young, 426 F.2d 93, Cert. Den. 400 U.S. 828 (1970) 23

Wangrow v. U.S., 399 F.2d 106 Cert. Den. 393 U.S. 933 (1968) 28

Whitely v. Warden, 401 U.S. 560 (1971) 30

Woods v. U.S., 240 F.2d 37 (CADC 1957) 34

Statutory and Rules Citations

	Page
18—U.S.C.—371	1, 4, 7
18—U.S.C.—659	36
18—U.S.C.—2	1, 6, 7, 8
18—U.S.C.—2314	1, 4, 5, 7, 8, 28, 36
18—U.S.C.—2315	1, 5, 6, 7, 28
28—U.S.C.—1254(1)	2
Rule 41(e) F.R.Cr.P.—18—U.S.C.	28
Rule 48(b) F.R.Cr.P.—18—U.S.C.	37

Constitutional Amendments Cited

Fourth Amendment	Multiple Citations
Fifth Amendment	" "
Sixth Amendment	" "

Other Authorities Cited

Heller, (1951) The Sixth Amendment to the Constitution of the U.S.	37
Brant (1955) The Birth of the Bill of Rights (1776-1791)	37
Nickens v. U.S., 323 F.2d 808 (CADC 1963)	37
Niro v. U.S., 388 F.2d 535 (1st Cir. 1968)	29
Paricer v. Gladden, 385 U.S. 363 (1966)	35
Pointer v. Texas, 380 U.S. 400 (1965)	35
Rogers v. U.S., 340 U.S. 367 (1951)	25
Sanders v. U.S., 373 F.2d 735 (10th Cir. 1967)	26
Sawyer v. U.S., 202 U.S. 165 (1906)	26

	Page
Schmerber v. Florida, 405 U.S. 427 (1972)	35
Shadwick v. City of Tampa, 407 U.S. 335 (1972)	29
Sibron v. New York, 392 U.S. 40 (1968)	30
Simmons v. U.S., 390 U.S. 377 (1968)	29
Simmons v. U.S., 440 F.2d 890 (7th Cir. 1971)	35
Smith v. Hooey, 393 U.S. 374 (1969)	38
Smith v. Illinois, 390 U.S. 129 (1968)	23, 35
Spinelli v. U.S., 394 U.S. 410 (1969)	31
Strunk v. U.S., 412 U.S. 434 (1973)	40
United States v. Allsenberrie, 424 F.2d 1209 (7th Cir. 1970)	29
United States v. Armour & Co., 137 F.2d 269 (7th Cir. 1943)	34
United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966)	29
United States v. Carey, 470 F.2d 469 (CADC 1972)	39
United States v. Cowan, 396 F.2d 83 (2nd Cir. 1968)	29
United States v. Dyson, 469 F.2d 735 (5th Cir. 1972)	39
United States v. Ewell, 383 U.S. 116 (1966)	38
United States v. Flannigan, 423 F.2d 745 (5th Cir. 1970)	30
United States v. Focarile, 469 F.2d 522 (4th Cir. 1972)	29

Page

United States v. Holiday, 472 F.2d 320 (10th Cir. 1973) 30

United States v. Jenkins, 436 F.2d 140 (CADC 1972) 25

United States v. Langley, 466 F.2d 27 (6th Cir. 1972) 29

United States v. Lyons, 397 F.2d 505 (7th Cir. 1968) 26

United States v. McNally, 473 F.2d 934 (3rd Cir. 1973) 29

United States v. Marion, 404 U.S. 307 (1971) 37

United States v. Mendoza, 441 F.2d 1107 (9th Cir. 1971) 35

United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972) 37

United States v. Miriani, 310 F. Supp 217 (D.C. Mich. 1968) 38

United States v. Morris, 477 F.2d 657 (5th Cir. 1973) 30

United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968) 33

United States v. Seavers, 472 F.2d 607 (6th Cir. 1973) 26, 33

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, by their attorneys, Noel L. Lippman, Sanford Rosenthal, and James D. O'Connell, pray that a Writ of Certiorari issue to review the judgment heretofore entered against them by the United States Court of Appeals for the Sixth Circuit.

1. OPINIONS BELOW

Petitioners were convicted in the United States District Court for the Eastern District of Michigan, Southern Division, by a jury on August 1, 1972, of violating §§371, 2314, 2315, and 2—Title 18, United States Code. On September

29, 1972, timely Notice of Appeal was filed (Appendix A). On February 28, 1974, the Court of Appeals for the Sixth Circuit affirmed petitioners convictions. The written opinion of the Court is annexed at Appendix B. On April 5, 1974, the Court of Appeals denied petitioners application for Rehearing En Banc, said order being set forth as Appendix C.

2. JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on February 28, 1974. Rehearing was denied on April 5, 1974. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28—United States Code—§ 1254(1).

3. QUESTIONS PRESENTED

Petitioners present the following questions for this Court's consideration:

As to both Petitioners:

I.

Did the government create reversible error by knowingly permitting the introduction of false testimony by its witness-in-chief to stand uncorrected before the Court and Jury in violation of the due process clause of the Fifth Amendment to the Constitution?

II.

Did the Trial Court commit reversible error by failing to sustain Petitioners Motions to suppress evidence ob-

tained as the result of a search and seizure based upon an affidavit which failed to establish probable cause and which contained materially false statements of fact in violation of the protections of the Fourth Amendment to the Constitution?

III.

Did the Trial Court commit reversible error by denying petitioners the right to confront and cross examine a non-witness whose statements were admitted into evidence through the testimony of a government witness over the objection of Trial Counsel, in violation of petitioners rights under the Sixth Amendment to the Constitution?

As to Petitioner Silverman, only:

IV.

Was Petitioner Silverman effectively denied the right to a speedy trial as the result of the government's failure to pursue its prosecution with diligence in violation of the Sixth Amendment to the Constitution?

4. CONSTITUTIONAL AND STATUTORY PROVISIONS

(a) The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the person or things to be seized."

(b) The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

(c) The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and . . . to be confronted with the witnesses against him . . ."

(d) Title 18—United States Code—§371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(e) Title 18—United States Code—§2314, provides:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate com-

merce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(f) Title 18—United States Code—§2315, provides:

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or

counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(g) Title 18—United States Code—§2, provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

A five count indictment was returned by the Grand Jury against six individuals, Alfonse Bartkus, Sam Norber, Robert "Bobby" Kahn, Lee Stephens, Milton Silverman and Wayne Paul Wakeford on August 9, 1971. The indictment charged violations of Title 18—United States Code—§§ 2, 371, 2314, and 2315.*

All defendants were charged in Count One with conspiring to commit the offenses against the United States proscribed by 18 USC §§2314, 2315 and 2.

Bartkus, Kahn and Norber were charged in Count Two with the transportation from Chicago to Detroit on January 20, 1970, of a load of aspirin stolen from the Penn Central Railroad in Chicago, Illinois and with aiding and abetting such transportation in violation of 18 USC §§2314 and 2.

In Count Three, Bartkus, Kahn and Norber were charged with receiving and storing such aspirin on January 22, 1970 in violation of 18 USC §2315.

In Count Four, Norber, Silverman and Wakeford were charged with the transportation of such stolen aspirin on January 27, 1970 from Detroit, Michigan to Cincinnati, Ohio and aiding and abetting in such transportation in violations of 18 USC §§2314 and 2.

In Count Five, Norber, Silverman and Wakeford were charged with the transportation of such stolen aspirin on February 2, 1970 from Detroit, Michigan to Cincinnati,

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* Note: References designated as Tr. followed by a number are to pagination contained in the trial transcript. The prefix Gx. followed by a number refers to Government exhibits presented at trial.

Ohio and aiding and abetting such transportation also in violation of 18 USC §§2314 and 2.

Two trials were had in this matter. At the commencement of the first trial on January 4, 1972, the government's motion to dismiss the charges as to Defendant Wakeford was granted. The first trial was concluded on February 9, 1972, when the jury advised the court that it could not agree upon any verdicts and was discharged.

On May 8, 1972, before the commencement of the second trial, Kahn pleaded guilty to the counts with which he was charged. He was not sentenced, however, until August 29, 1972, 28 days after that trial had concluded.

The second trial began on June 6, 1972 and went to the jury on Jury 31, 1972. Before submitting the case, the court dismissed the charges against Norber in Counts Four and Five.

On August 1, 1972, the jury returned verdicts of guilty as to Bartkus, Norber, Stephens and Silverman on all the counts with which they were then charged.

The events which gave rise to the charges against the defendants are set forth in chronological order rather than in the order that the evidence was presented at trial. Each series of events are described under separate headings. As is pointed out throughout this statement, there was no direct evidence linking the events described under one heading with those described under another.

1. Shipment of a trailer loaded with Bayer aspirin and other products by rail from Glenbrook Laboratories in Trenton, New Jersey to the Penn Central yard in Chicago, Illinois.

On January 12, 1970, Glenbrook Laboratories, a division or subsidiary of Sterling Drug Company, shipped a trailer containing Bayer aspirin, Vanquish, Midol and children's aspirin to Chicago, Illinois by rail (Tr. 191-220). The trailer arrived at the Penn Central yard in Chicago, but it disappeared from the Penn Central yard before delivery to the consignee (Tr. 445-447). It was possible that the trailer could have left the Penn Central yard without passing through the yard gates since the yard was not completely fenced. (Tr. 527-531). On January 19, 1970, the trailer, which was then empty, was found parked on a Chicago Street (Tr. 585).

2. Transportation of a trailer loaded with Bayer aspirin and other products over the highways from Chicago, Illinois to Detroit, Michigan.

The evidence as to the events described under this heading came entirely from the testimony of Salvatore Caracappa, a fifty-year old independent trucker who has owned his own tractor for twenty-five years and been in the trucking business for thirty years (Tr. 596). In January 1970, Caracappa had the use of a Chicago tavern for his office (Tr. 574).

On January 19 or 20, 1970, Caracappa received a telephone call from Kahn whom he had known for fifteen years, and met with Kahn in a tavern (Tr. 590, 677). Kahn was accompanied by Bartkus who Caracappa had not previously

met. Kahn introduced Bartkus to Caracappa as a "buyer of stolen merchandise" (Tr. 683-684). At the meeting Kahn told Caracappa that he wanted him to haul a load to Detroit, Michigan, offering to pay him $600 to do so (Tr. 682, 685). The meeting lasted about an hour. Sometime later that day Kahn completed the arrangements with Caracappa and, among other things, advised him that the trailer he was to haul would be legitimate, but that it would contain a load that had been transferred from a Penn Central trailer (Tr. 687). Kahn told Caracappa that the load was stolen (Tr. 921).

Although he denied it to be the fact, Caracappa admitted that he may have told FBI Special Agent Arthur G. Behm that he met Bartkus subsequent to his hauling a load of aspirin to Detroit on January 19 or 20 (Tr. 928). He also admitted that some time in 1970 he had hauled another load to Detroit but refused to state the commodities that he carried (Tr. 853-854, 951).

On January 20, 1970, Caracappa using his own tractor and pursuant to his arrangement with Kahn hauled a trailer to Detroit (Tr. 689-692). During the course of the trip he looked in the trailer and observed "palletized boxes of Bayer aspirin" (Tr. 692). At some time during the trip, he stole three cases from the shipment (Tr. 833). Caracappa sold these three cases to a person whom he refused to identify (Tr. 960).

When Caracappa arrived in Detroit, he was met by Lee Stephens who identified himself as his "man in Detroit" (Tr. 696-699). The commodities transported by Caracappa from Chicago to Detroit were never specifically identified as having been on the shipment from Trenton, New Jersey to Chicago, Illinois.

3. Meeting at Lee Stephens' house on January 20, 1970 and unloading of trailer on January 21, 1970.

In the evening of January 20, 1970, Caracappa, Stephens, Stephens' wife, Kahn, Bartkus, Norber and a Mary Ann Soots were present at Lee Stephens' house. At some time during the evening, Caracappa overheard bits of a conversation among Bartkus, Kahn and Norber regarding the commodities on the trailer (Tr. 701-703). Bartkus and Norber did the talking while Kahn stood by with some yellow papers in his hand listing commodities on the trailer (Tr. 704-705). The only specific words which Caracappa overhead consisted of a statement by Bartkus "This is what it is" and the statement by Norber "If that is what it is—I own it" (Tr. 705). Later that evening Caracappa returned to his truck and slept in the cab (Tr. 706-707).

The next day, the contents of the trailer were unloaded and placed on the second floor of a warehouse at Grand River and Fourth Street in Detroit, Michigan (Tr. 740-742). Kahn, Norber, Bartkus and Stephens were present at times while the trailer was being unloaded.

The warehouse space was rented on January 21, 1970, by a Bill Collins for $200.00 for one month (Tr. 1105-1107).

During the unloading, there was a discussion between Norber and Kahn in Bartkus' presence to the effect that Norber was a few thousand dollars short, and Norber went to get more money (Tr. 747-748). Shortly thereafter, Norber gave Kahn an envelope containing money (Tr. 749-750). When the unloading was completed, Kahn paid Caracappa $1,000.00 and he returned to Chicago with the trailer (Tr. 751-752).

At the time of the trial, Caracappa was under indictment in three federal cases in Chicago; one of those indictments stemmed from his arrest in Michigan (Tr. 843-844, 1003-1007).

4. Various contacts among Norber, Stephens and Wakeford after January 21, 1970, including transportation of aspirin by Silverman and Wakeford to Cincinnati, Ohio.

About a week after the meeting at Stephens' house on January 20, 1970, Norber, accompanied by Mary Ann Soots, met Silverman at a Greenfield's Restaurant on Woodward in Detroit. (Tr. 1064-1065). Although Norber and Silverman had some conversation, its content is unknown (Tr. 1069).

Toward the end of January 1970, around January 26, 1970 (Tr. 1955), Wakeford and Silverman picked up Stephens at Norber's house in Detroit and went with Stephens in an empty U-haul truck to an Amy Joy Donut Shop (Tr. 1955). On arriving at the donut shop, Wakeford gave the keys to the truck to Stephens who drove it away. Two or three hours later Stephens returned with the truck and gave the keys back to Wakeford (Tr. 1956). The truck now drove as if it was loaded (Tr. 1959).

Silverman and Wakeford attempted to make a delivery, were unable to do so and parked the truck at Silverman's place of business for the night (Tr. 1959). The following day, they went with the truck to Castle City Furniture where they unloaded 250 cases of Bayer aspirin (Tr. 1961).

In the morning of January 26, 1970,[1] Silverman and Wakeford, driving a green 1971 Ford van truck, stopped at Norber's home, left a few minutes later and went to the warehouse at Grand River and Fourth where they left their truck for about a half hour (Tr. 1127-1131). They returned

[1] The dates January 20, 27, 1970 were supplied by three government witnesses, Haystrom, Holt and Bushor. Wakeford testified to a similar series of events as occurring a week after January 26, 1970.

to their truck, which was empty except for some tires, and after stopping for lunch, went to the Castle City Furniture Store on East Eight Mile Road in Detroit (Tr. 1131-1132, 1424-1425). Nothing was loaded onto the truck while it was at the Grand River and Fourth Street location (Tr. 1424). It may have been on this occasion that Wakeford observed 800 to 1,000 boxes of Bayer aspirin on the second floor of that warehouse (Tr. 1061-1066).

Boxes of Bayer aspirin were loaded onto the Ford truck at Castle City Furniture (Tr. 1122-1124). Silverman and Wakeford then drove the truck to Cincinnati, Ohio where on January 27, 1970, they delivered the aspirin to Save Discount Company which it paid $6,798.36 (Tr. 1226-1231, 1621).

On or about February 2, 1970,[2] Wakeford met with Stephens and Silverman at a Greenfield's Restaurant (Tr. 1973). Wakeford gave Stephens the keys to the green truck he was driving and Stephens left. After lunch, Silverman left after instructing Wakeford to meet him in Fremont, Ohio (Tr. 1974). In about one and a half hours, Stephens returned with the truck and Wakeford started out for Fremont. The truck broke down outside of Fremont (Tr. 1974-1975). Silverman met Wakeford in a U-haul truck and they transferred 175 cases of Bayer aspirin from the broken down truck into the U-haul (Tr. 1974-1975). They then drove to Save Discount Company in Cincinnati where they delivered the aspirin to Ted Davidson who paid $7,179.93 (Tr. 1827).

On February 18, 1970, Silverman and Wakeford loaded a U-haul truck with boxes of Bayer aspirin at Castle City

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[2] Government witness Davidson of Save Discount in Cincinnati, testified to receipt of deliveries on January 27, 1970 and February 2 and 13, 1970. The latter delivery, however, was of only 20 boxes.

Furniture. The next day, they were arrested while driving the U-haul truck. Following their arrest, 190 cases of Bayer aspirin, Midol and Vanquish and some hair spray and shampoo were seized from the truck (Tr. 1471). The same day 38 boxes of Bayer aspirin were seized from Castle City Furniture (Tr. 1468).

On March 3, 1970, FBI Special Agent Marshall Judd obtained seven cases of Bayer aspirin (Gx. 87-93) from Sigmund Snider of Variety Sales Company in Cincinnati, Ohio (Tr. 1913). On the same day, he received 102 cases and a couple odd dozen of Bayer aspirin from Dennis Osterfeld of Merchandise Inc. of Cincinnati, Ohio (Tr. 1920). Except for five cases (Gx. 147-151) received from Osterfeld, all of the cases of aspirin obtained in Cincinnati had been part of the deliveries made by Silverman and Wakeford to Save Discount Company and been resold to Variety Sales Company and Merchandise Inc.

5. Identification of aspirin and other products obtained in Detroit and Cincinnati as being part of the shipment from Trenton, New Jersey to Chicago, Illinois.

Over 337 boxes of Bayer aspirin and other products were brought into the courtroom. They consisted of the following:

(a) The 38 boxes of Bayer aspirin seized from Castle City Furniture, Detroit, Michigan on February 19, 1970.

(b) The 190 cases of Bayer aspirin, Midol and Vanquish seized on February 19, 1970, from a U-haul truck in which Silverman and Wakeford were driving at the time of their arrest.

(c) The 7 cases of Bayer aspirin obtained from Variety Sales Company, Cincinnati, Ohio, March 3, 1970.

(d) The 102 cases of Bayer aspirin obtained from Merchandise Inc., Cincinnati, Ohio on March 8, 1970.

The shipment from Trenton to Chicago carried 1,581 cases of Bayer aspirin, Vanquish and Midol and 48 cases of yeast. Each case or box bore a code number which indicated the number and type of container of the aspirin tablets themselves. These code numbers do not provide any method of determining whether or not a particular box was on the shipment. Boxes bearing the same code numbers were part of other shipments from Trenton.

With regard to one of the code numbers, 893 A, which designated a package designed for promotional purposes, additional numbers were stamped on the cases. Each of these cases bore a daily control number indicating the day on which it was packed and the cases packed on each day were numbered consecutively. On the shipment in question, there were 112 cases marked 893 A which at the time of shipment bore daily control number A 009 and consecutive numbers 449-560. Only four of 893 A cases offerred in evidence bore either the daily control number or consecutive number.

In addition to the product code numbers, Glenbrook Laboratories had records of the manufacturing control numbers assigned to particular batches of products. One of these records showed the control numbers of the products shipped from Trenton to Chicago on January 12, 1970 (Gx. 119). The manufacturing control numbers, like the code numbers, provided no means of determining whether a particular box was on the shipment to Chicago since boxes

having identical numbers were shipped to different locations (Tr. 2578-2583).

Of the 337 cases brought into the courtroom, only six cases, all of which were seized in Detroit from the U-haul truck, were identified as having been on the shipment. Four of these cases bore code 893 A. One (Gx. 23) carried daily control number A 009 and consecutive number 472, and was thereby identifiable as having been on the shipment (Gx. 119). Three other 893 A cases had only the consecutive numbers, 553 (Gx. 24), 465 (Gx. 25) and 477 (Gx. 26). These boxes, however, could be identified from the manufacturing control numbers of their contents assuming of course that the contents were as originally packed (Tr. 2502-2504).

The remaining two cases which were identified were so called "split cases" which also had been seized in Detroit on February 19, 1970 (Gx. 29 and Gx. 32). They each contained some product bearing one manufacturing control number and some product bearing another (Tr. 2389-2409, 2701-2705). Two such cases were on the shipment and Glenbrook Laboratories produced or packaged no other cases containing the product with those control numbers (Tr. 2406-2408).

None of the 109 boxes obtained in Cincinnati were identified as being on the shipment. Five of them definitely were not. (Gx. 147-151, Tr. 2259-2260).

Despite the absence of identification of any boxes, except the six, as having been on the shipment, all 337 boxes were admitted in evidence over objection of defense counsel (Tr. 3137-3138).

6. REASONS FOR GRANTING THE WRIT

Petitioners herein, contend that the Court of Appeals for the Sixth Circuit failed to recognize violations of petitioners fundamental constitutional rights to be free from unreasonable searches and seizures; to the protections of due process of law; and to exercise their right to confront the witness against them. In addition, Petitioner Silverman contends that the Court of Appeals failed to recognize a violation of his constitutionally protected right to a speedy trial.

During the course of the appeal brought in the Sixth Circuit, each defendant presented several issues for review. The opinion handed down by the Court is confusing in the respect that the reviewing panel reversed the conviction of Alfonse Bartkus on the grounds that the trial court had effectively denied him the right to confront a particular witness against him, and that said denial was prejudicial beyond repair. This inconsistency is fully set out under argument III below.

I.

DID THE GOVERNMENT CREATE REVERSIBLE ERROR BY KNOWINGLY PERMITTING THE INTRODUCTION OF FALSE TESTIMONY BY ITS WITNESS-IN-CHIEF TO STAND UNCORRECTED BEFORE THE COURT AND JURY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION?

At trial in the court below, the Government presented evidence in the form of testimony of one Salvatore Caracappa whose involvement in the matter was that of driver of the stolen load of Glenbrook Laboratories goods from Chicago to Detroit, allegedly at the instructions of defendants Kahn and Bartkus. Caracappa testified for several days on behalf of the Government. On cross-examination, the following colloquy took place:

"By Mr. Rosenthal:

Q. Mr. Caracappa, where are you presently employed?

A. Pardon?

Q. Where are you presently employed, sir?

A. I am self-employed.

Q. What do you do in your form of self-employment?

A. I haul merchandise around.

Q. You haul merchandise around. All right, sir. Is this in Chicago?

A. No.

Q. Where is this, sir?

Mr. Kelley: Well, objection, your Honor. May we come up to the bench on this?

Mr. Rosenthal: Yes, sir.

(Bench conference.)

Mr. Rosenthal: Mr. Cushran, would you please read the question back, sir?

(Question read back as follows: Where is this, sir?)

Q. Did you understand my question, Mr. Caracappa?

A. No, I didn't.

Q. I believe you stated that you were self-employed?

A. I am.

Q. And I believe my next question was in what manner or words to that effect and you said, I haul merchandise.

A. That's right.

Q. Now, where did you haul merchandise—where was this—where are you employed?

A. Middle West, over to the west coast.

Q. *What city do you work, in your form of employment, where you work out of?*

A. *Kansas City.*

Q. *Kansas City.* This is your own—is this your own company you have?

A. It's may own truck.

Q. *Mr. Caracappa, did the government or anyone else assist you in obtaining your present employment?*

A. *No.*" (Tr. 821-823).

The record reflects that subsequent to examination, Caracappa was excused by both sides, subsequent to recall (Tr. 1050), and the Government proceeded to call its next witness, one Marianna Soots. During the course of direct examination of this witness, a recess was called by the court. Subsequent to that recess, and prior to the resump-

tion of Mrs. Soots' testimony, the following colloquy was had outside the presence of the jury:

"Mr. Rosenthal: Your Honor, before we proceed in this matter, I would like the record to reflect that during the course of the prior trial had before Judge Thornton in January and part of February this year, we asked for all statements under the Jencks Act and was given one statement from Marianna Soots.

We now are given another one, which I'm sure wasn't in existence at that time. It's dated March 30, 1971 and I think the records should reflect that we did not receive it when we should have.

The next question is related as to whether or not—and I think Mr. Kelley has stated that Mr. Caracappa was not truthful or candid when he stated where he was working from, the answer being Kansas, and he made this known to the Court and to defense counsel.

So the next proposition is what we propose doing about it and I advised the Court that we discuss it during the recess and come up with a conclusion.

And as to Mr. Zanglin, do you agree?

Mr. Zanglin: My reply would be that counsel stipulate in front of the jury that Mr. Caracappa lied about that without having to go into major reasons why he had to go to Kansas City because he had to hide his place of employment because I think that would be very prejudicial to these defendants in a right to a fair trial.

The Court: Mr. Kelley, would you care to respond?

Mr. Kelley: Well, your Honor, I am not willing to stipulate to that and the reason that I disclose

this to the Court and to the defense counsel—I am leaving him the option—if they want to cross-examine him about it, they're free to do so. They can ask him did you testify truthfully when you said you worked out of Kansas—

Mr. Zanglin: Well, you admit that he's lying?

Mr. Kelley: I'll—the effect is this: They have the information, I've conveyed it to them. They can go into it further with him and if they do, I'm entitled to ask for an explanation of what he testified that way. They can't have their cake and eat it, too. If they're getting—

The Court: I'll let them exercise that option. You've disclosed it for the Court and to the attorneys. We'll confront that if and when the situation comes up.

Now, can we move on to the next matter?

Mr. Zanglin: Okay.

But, just let the record reflect that he lied about that.

The Court: He said that on three occasions here, Mr. Kelley has said that.

Mr. Zanglin: Well, suppose it was because the witness feared for his life and that is what he would like to bring out on redirect if he—we point out to the jury that he did lie.

Mr. Chandler: Could I just say one thing, your Honor?

I think there's a difference of asking a witness to tell if he is going to say I am afraid, I think that would be completely improper. I think the only proper thing that Mr. Kelley would be able to bring you which I assume is not the truth, would be something connected with these defendants. It would be another—

The Court: It's the Court's—excuse me, Mr. Chandler—it's the Court's understanding that Mr. Kelley is not planning to bring Mr. Caracappa back.

Do you, Mr. Kelley?

Mr. Kelley: No, your Honor, I don't.

The Court: Well, we'll—whether or not they want to do it, I don't see exploring that, it may not materialize.

Mr. Rosenthal: Your Honor, as a practical matter, if the witness is going to, is he still subject to recall?

The Court: That's precisely what the Court is saying.

Mr. Zanglin: Well, what I'm saying its I'd like to bring him back then I want Mr. Kelley to be—

The Court: Do you want him brought back now, sir?

Mr. Zanglin: I'm respectfully—

The Court: I am not going to rule on something before it appears. If you bring him back and put him on the stand, then the Court will rule on it at that time and not before then.

Mr. Lippman: No.

The Court: Will you please bring in the jury, Mr. Simon and Agent People, will you get Mrs. Soots.

Mr. Lippman: Mr. Caracappa is still here, isn't he?

Mr. Kelley: We could probably stop him, he's going to the airport, he's got a flight.

The Court: If you need him we'll get him back from Chicago. (Tr. 1080-1085).

In addition to the foregoing, the trial transcript contains conflicting statements relative to Caracappa's testimony

which was permitted into evidence. For example, Caracappa's testimony describing the brand of aspirin he hauled as Bayer aspirin was impeached by reference to his testimony before the Grand Jury that the brand might have been Bufferin or Anacin (Tr. 830-832, 860). Caracappa "explained" the discrepency by testifying that he had stolen three cases from the shipment (Tr. 833). When asked what he did with the aspirin on cross-examination, he testified:

> "Q. Did you sell the commodities that you took?
> A. Yes.
> Q. Who did you sell them to?
> A. I take the Fifth Amendment." (Tr. 960).

Over the strenuous objection of defense counsel, the trial court upheld Caracappa's invocation of the privilege. (Tr. 975). In so doing, the trial court effectively denied the defense another opportunity to test the validity of Caracappa's evidence.

Petitioners submit that the admittance into evidence of Caracappa's false statements as well as permitting the witness to invoke the Fifth Amendment relative to facts material to the innocence of the defendants constitutes reversible error.

The Sixth Circuit has held specifically that the prosecution may not knowingly suborn false testimony or suppress exonerating evidence. *United States v. Young,* 426 F 2d 93; cert denied 400 US 828 (1970). This holding is in direct conflict with the facts presented in the instant Petition. It is a well settled principle that the purpose of cross-examination is to test the truth and veracity of a witness' testimony as it relates to a defendant. *Smith v. Illinois,* 390 US 129 (1968). Here, the jury was kept ignorant of an important material fact, not just that the witness had

moved to a new residence, in another city and state, but that he had lied about it. Underneath this lie would have been the opportunity to explore the potential wealth of material relative to the Government's involvement with the witness, the extent of Government cooperation in aiding the witness to relocate, and the depth of the agreement entered into with the witness in exchange for his damaging testimony against defendants herein. The Supreme Court in *Napue v. Illinois*, 360 US 264 (1959), particularized that the "dignity of the United States Government will not permit the conviction of any person on tainted testimony." In the matter at bar, both the refusal of the Government to rehabilitate Caracappa's false statement and his exercise of the Fifth Amendment privilege, creates a severe credibility gap which the defense was precluded from exploring. Once the jury has been advised that a key witness has lied, the greater the potential for destroying the witness' credibility.

The Court of Appeals rationalized that because Caracappa had been in his new environment only a short time, his credibility was unlikely to be impeached on the question. However, it is clear that the Court misapplied or simply overlooked the underlying significance of the problem. As stated above, the Government successfully avoided the potential attack upon the relationship of the prosecution to the elicited testimony of the witness Caracappa. Said relationship being a well established subject of impeachment. *Giglio v. United States*, 405 US 150 (1972).

A close analysis of the record on the question at bar, reveals that there is strong evidence that the prosecution coerced the defense into the position of not recalling Caracappa to the witness stand. While the record indicates that the defense made a demand that the witness be recalled,

the follow-up on the demand was sharply curtailed by the Government's implication that upon re-direct examination, it would elicit information that the move made by Caracappa to a new location was the result of pressure exerted by the defendants. Admittedly, the Government did not speak to the specifics of the implication, but the defense was left without a doubt as to the direction the Government would pursue.

Under the doctrine set out in a long line of cases, i.e. *Berger v. Unittd States,* 295 US 78 (1935); *Mooney v. Holohan,* 294 US 103 (1935); *Alford v. United States,* 282 US 687 (1931); *Napue v. Illinois, supra; United States v. Jenkins,* 436 F 2d 140 (CADC 1972); and *Johnson v. United States,* 347 F 2d 803 (CADC 1965); to mention but a few, the kind of prosecutorial coercion demonstrated in the record at bar is just cause for reversal.

In its opinion affirming petitioners conviction, the Court of Appeals thoroughly misapplied the construction of the law relative to the invocation of the Fifth Amendment by a Government witness on cross-examination. The rationale set out by the Court seems to be that the exercise of the right depends upon the nexus of the subject matter to the issue on trial. The rationale is diametrically opposed to the proposition of law set out by the Supreme Court in *Rogers v. United States,* 340 US 367 (1951), which holds that once a witness has testified to incriminating matters on direct examination, he has waived the privilege and may not refuse to respond on cross-examination. Here, the witness Caracappa specifically refused to respond to questions pertaining to another shipment of aspirins which he admitted hauling at approximately the same time the shipment in the matter at bar allegedly took place. The Court of Appeals ruled that this information was of collateral

materiality and was therefore not cognizable to the issue at trial. The conclusion is erroneous.

Petitioners respectfully suggest that the testimony suppressed by Caracappa and upheld by the trial court was crucial relative to the truth and veracity of the witness' testimony in that had the jury been permitted to entertain the problem of multiple loads of aspirin, hauled and delivered by Caracappa to Detroit, Michigan, it would have created a reasonable presumption of doubt in relation to the specific charges tried in the court below. The result of the court's ruling permitting the witness to invoke the protection of the Fifth Amendment on facts material to the matter at bar is a direct denial of the right to confrontation. *Chambers v. Mississippi,* 410 US 284 (1973); and *United States v. Seavers,* 472 F 2d 607 (6th Cir 1973).

The rule which controls this element is explicit. If a witness gives incriminating evidence on direct examination, he waives his right to invoke the protections of the Fifth Amendment on cross-examination. *United States v. Lyon,* 397 F 2d 505 (7th Cir 1968); *Johnson v. United States,* 318 US 189 (1943); *United States v. Spector,* 102 F Supp 75; rev'd on other grn'ds, 193 F 2d 1202 (9th Cir 1951); *Brown v. Walker,* 161 US 597 (1896); *Sawyer v. United States,* 202 US 165 (1906); *Krotkiewicz v. United States,* 19 F 2d 421 (6th Cir 1927); and *Sanders v. United States,* 373 F 2d 735 (10th Cir 1967).

Finally, petitioners suggest that it is reasonable to draw the further conclusion that the Government's concern over Caracappa's refusal to answer material questions and its support of the trial court's ruling on the issue relates directly to the depth of the Government's involvement with the witness itself. It is absurd to foster the belief that the Government was unaware of the totality of Caracappa's

involvement with stolen loads of goods. It is equally absurd to presume that the Government was unaware that Caracappa had transported another load of aspirin to the Detroit area during the same time period as the matter at bar. The sum total then, of Caracappa's refusal to reveal information upon cross-examination on this crucial issue can be directly related to the Government's position of withholding material information from the jury pursuant to its understanding, (the extent of which remains a mystery), with the witness.

This Court has specifically held that the failure to reveal promises made by the Government to a witness prior to his testimony to a jury constitutes reversible error. *Giglio v. United States,* 405 US 150 (1972); and *Napue v. Illinois,* 360 US 264 (1959). The record herein is a positive indication that the Government failed to meet the burden set out as a fundamental requirement of due process of law by this Court.

Very recently, this Honorable Court provided a remedy for issues such as has been raised above. In *DeMarco v. United States,* (No. 73-5684, decided March 18, 1974), — US —; the Court determined that the issue requires an evidentiary hearing at the District Court level. In *DeMarco,* this Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded with instructions to further remand the matter to the District Court for further proceedings consistent with the opinion. Petitioners herein respectfully suggest that remand to the District Court for an evidentiary hearing on the issue presented above is required under the *DeMarco* ruling.

II.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY FAILING TO SUSTAIN PETITIONERS MOTIONS TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF A SEARCH AND SEIZURE BASED UPON AN AFFIDAVIT WHICH FAILED TO ESTABLISH PROBABLE CAUSE AND WHICH CONTAINED MATERIALLY FALSE STATEMENTS OF FACT IN VIOLATION OF THE PROTECTIONS OF THE FOURTH AMENDMENT TO THE CONSTITUTION?

The issue presented herein is that the affidavit (Appendix D) submitted in support of the application for search warrant contains materially false information relative to probable cause, and that pursuant to said information, a judicial officer issued a warrant to search. (Appendix E.) Subsequent to the execution of the search warrant, certain items, later produced as evidence at petitioners trial, was seized. The trial court overruled petitioners motion to suppress. It is petitioners position that the court's ruling on the motion to suppress is reversible error.[3]

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[3] Norber has standing to challenge the validity of the search and subsequent seizure on the following grounds:

> The indictment in this case charges Norber with the transportation of goods stolen in interstate commerce (18-USC-§2314), and with receiving goods that had been stolen in interstate commerce (18-USC-§2315). One of the elements the Government is required to prove in a prosecution of this nature, is that at sometime during the episode, Norber had actual or constructive possession of the stolen items. *Corey v. United States*, 305 F. 2d 232 cert. den. 371 U.S. 956 (1962). *Wangrow v. United States*, 399 F. 2d 106, cert. den. 393 U.S. 933 (1968); and *United States v. Simon*, 225 F. 2d 260 (2nd Cir. 1955).
>
> Rule 41(e)—Federal Rules of Criminal Procedure, speaks to the proposition that a "person aggrieved" by an unlawful search may move to have the property returned and the evidence suppressed. The Supreme Court in *Jones v. United States*, 362 U.S.

(continued on next page)

The working rule in all federal circuits is that an affidavit in support of an application for search warrant must be tested and interpreted by a judicial officer, and the the judicial officer must meet two criteria: (a) he must be neutral and detached; and (b) he must be capable of determining probable cause for the requested warrant. *Shadwick v. City of Tampa,* 407 US 335 (1972). See also: *United States v. McNally,* 473 F 2d 934 (3rd Cir 1973).

In 1972, the Sixth Circuit held that where tainted information comprises more than a very minor portion of that found in the supporting affidavit, the resulting warrant is invalid. *United States v. Langley,* 466 F 2d 27 (6th Cir 1972). It is crucial that the facts underlying the affidavit for a warrant to search, clearly substantiate the action requested, for although a reviewing court will pay deference to the judicial determination rendered, the judicial officer must serve a useful purpose and not serve merely as a rubbr stamp for the police. *Edmondson v. United States,* 402 F 2d 809 (10th Cir 1968). Further, it is well settled that the sufficiency of the application to a judicial officer for a warrant is required to be measured by the application itself and the facts that are asserted, under oath, therein. *United States v. Focarile,* 469 F 2d 522 (4th Cir 1972); and

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(continued from preceding page)

257 (1960), interpreted the meaning of "aggrieved party" and thus established who had standing to question the validity of a government search. *Jones* established the proposition that when, as here, possession of the seized evidence is itsef an essential element of the offense with which the defendant is charged the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of evidence. See also: *Simmons v. United States,* 390 U.S. 377 (1968); *Brown v. United States,* 411 U.S. 223 (1973); *United States v. Allsenberrie,* 424 F. 2d 1209 (7th Cir. 1970); *United States v. Cowan,* 396 F. 2d 83 (2nd Cir. 1968); *Niro v. United States,* 388 F. 2d 535 (1st Cir. 1968); and *United States v. Bozza,* 365 F. 2d 206 (2nd Cir. 1966).

Whitely v. Warden, 401 US 560 (1971), which case holds to the proposition that before a warrant for search or arrest may issue, a judicial officer must be supplied with sufficient information of fact to support an independent judgment.

In the matter at bar, the record indicates that there were at least six false statements contained in the affidavit submitted in support of the application for search warrant. (Compare affidavit, Appendix D with the trial transcript at pages: 3293-3302; 1301; 1399-1400; 1323-1325; 1608-1609; and 1701-1702.)

The Supreme Court has held that no search required to be made under warrant is valid if the procedure for issuance of the warrant is inadequate to insure the sort of neutral contemplation by a judicial officer, of the grounds laid for the search. *Sibron v. New York,* 392 US 40 (1968). See also: *United States v. Holiday,* 472 F 2d 320 (10th Cir 1973); *United States v. Flannigan,* 423 F 2d 745 (5th Cir 1970); and *United States v. Morris,* 477 F 2d 657 (5th Cir 1973), which holds that when an affidavit for search warrant contains inaccurate information which may materially affect its showing of probable cause, any warrant based thereon is rendered invalid.

In *Aguilar v. Texas,* 378 US 108 (1964), the Supreme Court struck down a state search warrant on the basis of an affidavit which contained materially false information. The Court held the affidavit inadequate for two reasons: First, the application failed to set out any of the underlying circumstances necessary to enable the magistrate to independently judge the validity of the compainant's conclusion. Second, the affiant-officers did not attempt to support their claims that their informant information was credible or reliable. Here, the situation is similar. The

affidavit in support of the warrant to search cites eleven paragraphs which purport to support probable cause for the search. At trial, however, the testimony of the witnesses whose information was used in the affidavit, refuted the veracity of the affidavit.

On point is *Spinelli v. United States,* 394 US 410 (1969), which involved an affidavit containing a report from an unindentified informant as well as an independant FBI investigation purporting to corroborate the informant information. The *Spinelli* Court held that a magistrate is obligated to render a judgment based upon common sense and a reading of the entire affidavit. *United States v. Ventresca,* 380 US 102 (1965). The Court held further, that the "totality of circumstances" approach taken by the majority of federal courts, "paints with too broad a brush."

The affidavit in the matter at bar must be measured against *Aguilar's* two-pronged test so that its probative value can be assessed. Here, we have a strong showing that at least six of the alleged "facts" submitted in support of the application, were false and the collateral allegations simply could not have supported probable cause, standing alone. Applying the principles of *Aguilar* and the supporting case law, it is clear that the search conducted in the case at bar failed to satisfy the stringent demands of the Fourth Amendment.

III.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY DENYING PETITIONERS THE RIGHT TO CONFRONT AND CROSS EXAMINE A NON-WITNESS WHOSE STATEMENTS WERE ADMITTED INTO EVIDENCE THROUGH THE TESTIMONY OF A GOVERNMENT WITNESS OVER THE OBJECTION OF TRIAL COUNSEL, IN VIOLATION OF PETITIONERS RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION?

At trial, the Government prosecuted this case on the theory that the conspiracy alleged was a continuing enterprise rather than two separate conspiracies. The Court of Appeals upheld the Government's theory, commenting at pages 7 and 8 of its opinion:

> ". . . It is not necessary that each member of the conspiracy be a member of it from the beginning so long as each joins it while it is still in operation. (citation ommitted). We do not believe that the conspiracy ended, as a matter of law, when Bartkus and Kahn delivered the merchandise to Norber and Stephens . . . Possession by one of goods shown to have been recently stolen is sufficient to make a prima facie case that the person in possession knew of the stolen nature of the goods." (citations omitted.)

In its opinion, the court affirmed the conviction of Petitioners, while at the same time reversing the conviction of another. In reversing the conviction of Alfonse Bartkus, the court held that the trial court effectively denied Bartkus the right to confrontation and cross-examination by permitting into evidence, hearsay testimony spoken by the Government's key witness, relative to the stolen nature of the cargo described in the indictment. The Court held that *Chambers v. Mississippi,* 410 US 284 (1973), was

controlling and that *Chambers* is supported by this Court's decision in *United States v. Seavers,* 472 F 2d 607 (1973) [Op pg 10]. The court further held without citing any authority therefore, that Bartkus, alone, was affected by the Sixth Amendment violation. (Op pg 11).

Subsequently, the opinion of the Court held that the introduction of hearsay testimony, again spoken by the witness Caracappa, and indicating that Bartkus had been introduced as a "buyer of stolen merchandise," prejudiced Bartkus beyond repair. Thus, as far as Bartkus is concerned, his conviction stands reversed. The Court cited as controlling on the issue: *Michaelson v. United States,* 335 US 469 (1948), and *United States v. Rudolph,* 403 F 2d 805 (6th Cir 1968). Again, Bartkus was singled out for relief without citing authority to support the rationale. (Op pg 19).

It is Petitioners argument that the Court of Appeals created an inconsistancy whereby they affirmed the convictions of three defendants and reversed as to the fourth, following a finding that the four men were involved in a continuing or "chain conspiracy." The decision is also inconsistant and confusing on the face of the rationale: "that possession of stolen goods is sufficient to make a prima facie case that the person in possession knew of the stolen nature of the goods." While the Court cites no authority for limiting the constitutional relief to Bartkus alone, Petitioners proceed upon the premise that they too, were effectively denied the constitutionally protected right to confront a material witness subsequent to the admittance of hearsay testimony, the nature of which infected the entire prosecution.

The Legislature designed the conspiracy statute to permit the conviction of participants for their concerted action in a particular criminal endeavor, thereby making the crime easier to perpetrate and harder for the authorities to detect. *Woods v. United States,* 240 F 2d 37 (CADC 1957), cert den 353 US 941, and *Curtis v. United States,* 354 US 926 (1957). The standard rule in federal circuits being that the character and effect of a conspiracy are not to be judged by dismembering it and viewing it in separate parts. *Carlson v. United States,* 187 F 2d 366 (8th Cir 1951); *United States v. Armour & Co.,* 137 F 2d 269 (1943). Here, the Court of Appeals apparently disected the conspiracy to eliminate any taint flowing from the testimony which it concedes violated the Sixth Amendment. The problem is, of course, that the testimony itself went to the heart of this prosecution and infected the right to confrontation by each defendant equally. Crucial to this argument is the fact that the testimony which tainted the Bartkus conviction: i.e., that the cargo was stolen, and that he was known as a buyer of stolen merchandise, encompasses the primary element of this prosecution—knowledge that the goods were, in fact, stolen, and the requisite "evil purpose" to facilitate a conspiracy. It simply does not follow, that on the one hand the Court should determine that the conspiracy was a continuing operation and that all defendants must be considered as participants, and on the other to affirm the convictions of three defendants while reversing as to the fourth on the ground that he was denied the right to confront a witness. The testimony spoke to a key element in the conspiracy, and was admitted into evidence notwithstanding that it was hearsay and highly prejudicial. The plain fact remains, that a jury cannot be relied upon to make the fine determination of prejudice that a skilled attorney might make, or a trial judge. There can be no

question that the testimony, while directed at Bartkus, infected the proceedings from that point on, and in the minds of the jury, who is to say what seeds of guilt were planted?

Very simply, then, the court's affirmation of Petitioners convictions is inconsistant with the protections afforded all criminal defendants pursuant to the Confrontation Clause of the Sixth Amendment. The protection is absolutely fundamental, and a denial of said right requires reversal. *Schneble v. Florida,* 405 US 427 (1972); *Favre v. Henderson,* 464 F 2d 359 (5th Cir 1972); *McKissick v. United States,* 379 F 2d 754 (5th Cir 1967); *Holman v. Washington,* 364 F 2d 618 (5th Cir 1966); *Goings v. United States,* 377 F 2d 753 (8th Cir 1967); *Simmons v. United States,* 440 F 2d 890 (7th Cir 1971); *Bruton v. United States,* 391 US 123 (1968); and *United States v. Mendoza,* 441 F 2d 1107 (9th Cir 1971).

The Supreme Court has spoken to this issue on a number of occasions. In *Smith v. Illinois,* 390 US 129 (1968), this Court held the violation of the right to confrontation, constitutional error and determined that the degree of prejudice does not mitigate the infirmity. In *Chambers v. Mississippi,* 410 US 284 (1973), this Court held that the denial of the right to confrontation calls into question the ultimate integrity of the fact finding process. In *Brookhart v. Janis,* 384 US 1 (1966), this Court held that denial of the right to confrontation and cross-examination was constitutional error notwithstanding any showing of prejudice. In *Barber v. Page,* 390 US 719 (1968), this Court maintained that the right to confront one's accusers and the cross-examination thereof is essential and a fundamental requirement to a fair criminal trial. See also: *Parker v. Gladden,* 385 US 363 (1966); and *Pointer v. Texas,* 380 US 400 (1965).

In affirming Petitioners convictions, the Court of Appeals failed to recognize the clear constitutional error relative to the issue of confrontation. The Court's decision to affirm, in the light of its decision to reverse the conviction of Bartkus is inconsistant, and fails to comport with the overwhelming case law on point.

As to Petitioner Silverman, only:

IV.

WAS PETITIONER SILVERMAN EFFECTIVELY DENIED THE RIGHT TO A SPEEDY TRIAL AS THE RESULT OF THE GOVERMENT'S FAILURE TO PURSUE ITS PROSECUTION WITH DILIGENCE IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION?

On direct appeal, Petitioner Silverman raised the issue of a Sixth Amendment violation of the right to a speedy trial. The Court of Appeals failed to recognize this issue thus denying Silverman the right to full review on the violation of a fundamental right.

The facts are as follows: Silverman was arrested on February 19, 1970, and subsequently, on April 1, 1970, was indicted for violations of 18—USC—§659, and §2314. The record further reflects that the Government failed to respond to pre-trial motions to suppress evidence, and on June 18, 1971, the Government filed a superceding indictment which is the basis of the current prosecution. Trial to a jury did not commence until January 4, 1972. The period of time that elapsed between the original indictment and the subsequent trial being some 644 days.

The rule relative to speedy trial is well settled on the point of *when* the right may be invoked. Federal courts recognize that the crucial element in determining the start-

ing point for computing the delay in a criminal trial must begin with the indictment. *United States v. Marion,* 404 US 307 (1971), and that the right attaches and remains intact throughout the life of the criminal prosecution.

Here, the Government's prosecution began on April 1, 1970, and it is this indictment and not the superceding indictment which initiates the protections of the Sixth Amendment. *United States v. Merrick,* 464 F 2d 1087 (10th Cir 1972), and the 644 day delay following this indictment can only be laid at the feet of the Government. The record reflects that at no time did any defendant herein ask for or receive a continuance or stay of the proceedings.

There can be no question that the Sixth Amendment right to a speedy trial was designed to guarantee to a criminal defendant that the Government will move with the proper dispatch which is appropriate to assure him the earliest possible disposition of the charges against him. Heller, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, (1951); Brant, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, (1955);

Rule 48(b)—Federal Rules of Criminal Procedure, which has the force of law, authorizes dismissal of an indictment if there is ". . . an unnecessary delay in bringing a defendant to trial . . ." and the Rule is clearly limited to post-arrest situations. *Nickens v. United States,* 323 F 2d 808 (CADC 1963); *Harlow v. United States,* 301 F 2d 261 (5th Cir 1962); *Hoopengarner v. United States,* 270 F 2d 465 (6th Cir 1959).

The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality on the need to have charges properly exposed. "If the case for the prosecution calls for the accused to meet charges rather than to rest on the infirmities of the prosecution's case as is

the defendant's right, the time to meet them is when the case is fresh. Sale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, *the right to a prompt inquiry into criminal charges is fundamental, and the duty of the charging authority is to provide a prompt trial.*" (Emphasis supplied.): *Dickey v. Florida,* 398 US 30 (1970). It has long been the rule under our system of justice that long delays in the prosecution of those charged with criminal activity are inimical to the system and may not be countenenced. *United States v. Miriani,* 310 F Supp 217 (DC Mich 1968) and it is incumbent upon the prosecutor to press criminal cases to trial, to give them any necessary priority, and to prevent even the suggestion of staleness. *Hodges v. United States,* 408 F 2d 543 (8th Cir 1969).

The Sixth Amendment guarantee of a speedy trial is "an important safeguard to prevent undue and oppressive incarceration, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that delay will impair the ability of the accused to defend himself." *United States v. Ewell,* 383 US 116 (1966); see also: *Klopfer v. North Carolina,* 386 US 213 (1967); and *Dickey v. Florida, supra.* Inordinate delay between indictment and trial may impair a defendant's ability to defend himself, but the major evils are reflected in the fact that an indictment is a public act that may have serious ramifications on and interfere with a defendant's liberty whether he is free on bail or not; that may disrupt his employment, drain his finances; create untoward anxiety; curtail his associations; subject him to public criticism, and other intangible effects. These considerations were the underpinnings of the Supreme Court's holdings in *Klopfer, supra,* and *Smith v. Hooey,* 393 US 374 (1969).

In 1972, the Supreme Court further refined the law relative to speedy trials and in *Barker v. Wingo,* 407 US 514 (1972), described the relevent factors underlying a denial of the right. *Barker* speaks to: (a) the length of delay; (b) the cause of the delay; (c) assertion of the right to a speedy trial; and (d) prejudice to the accused. In this matter, Silverman directs the Court's attention to the 644 day delay in bringing the case to trial and respectfully suggests that it would be patently absurd to claim that a delay of this magnitude is consistent with the speedy trial guarantee. *United States v. Dyson,* 469 F 2d 735 (5th Cir 1972); *Arrant v. Wainwright,* 468, F 2d 677 (5th Cir 1972); *United States v. Carey,* 470 F 2d 469 (CADC 1972); and *U.S. ex rel. Stukes v. Shovlin,* 464 F 2d 1211 (3rd Cir 1972).

In addition to the above, the record in this case is absolutely silent relative to any delay which might have been attributed to the defendants. It is incumbent upon the Government to prosecute and to avoid delay. The record indicates that the Government failed to honor its mandate.

While the record does not indicate that there was lodged any particularized objection to the Government's delay herein, the supporting case law refuses to recognize that the defendant need assert his right to a speedy trial. *United States v. Dyson, supra; Barker v. Wingo, supra, Johnson v. Zerbst,* 304 US 458 (1938); *Dickey v. Florida, supra,* wherein it was determined that it ". . . is inconsistant with the traditional requirement that waiver be knowingly and voluntary, *and with the notion that a defendant has no duty to bring himself to trial.*" (Emphasis supplied.)

On the element of prejudice, *Barker* does not speak to any requisite level, but only sets out a guideline for determining a violation of a fundamental right. The Supreme

Court has taken the Barker guideline several steps farther in *Strunk v. United States,* 412 US 434, (1973); and *Moore v. Arizona,* 414 US 25, (12-31-73), wherein the Court held that *none* of the guidelines set out on *Barker* are necessary to the finding of a denial of the right to a speedy trial. Rather, they are related factors to be considered together with other circumstances which may be relevant. See also: *Hoskins v. Wainwright,* — F 2d — (5th Cir 1973).

It is instructive to note, however, that the record here, reflects that upon filing its superceding indictment, the Government charged Silverman with a new count (conspiracy) and added four co-defendants. Even more important, is the fact that Silverman's original co-defendant, Wakeford, was not prosecuted in return for his testimony against the defendants. It is obvious from this record that the delay in prosecuting Silverman worked to the Government's great advantage and to the substantial prejudice of all the defendants.

It is also instructive to note that the only available remedy in a matter involving a blatant violation of the defendant's right to a speedy trial is dismissal of the charges. *Strunk v. United States, supra.* On this record, the constitutional violation is apparent and the remedy is reversal.

7. CONCLUSION

Wherefore, by reason of the foregoing premises, petitioners pray that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and order this cause to be heard on the merits.

Respectfully submitted,

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APPENDIX A

United States District Court—Eastern District of Michigan
Southern Division

(Filed September 29, 1972)

United States of America, Plaintiff, v. Sam Norber, Alfonse Bartkus, Robert "Bobby" Kahn, Lee Stephens, Milton Silverman and Wayne Paul Wakeford. Defendants.	Criminal No. 46130

NOTICE OF APPEAL

Now Comes Milton Silverman, one of the defendants herein, by his attorney, NOEL L. LIPPMAN, and hereby makes this his Notice of Appeal, showing unto this Honorable Court as follows:

1. That the defendant-appellant's name and address is as follows, to-wit:

MILTON SILVERMAN
13241 Dartmouth
Oak Park, Michigan 48237
(Oakland County)

2. That defendant-appellant's attorney is as follows, to-wit:

NOEL L. LIPPMAN
Attorney at Law
29400 Van Dyke Avenue
Warren, Michigan 48093
(Macomb County)

3. That the defendant-appellant was charged in the within cause with the following offenses, to-wit:

A. Title 18, United States Code, Sec. 371 Conspiracy to Transport Stolen Property;

B. Title 18, United States Code, Sec. 2314 Interstate Transportation of Stolen Property on 1-27-70;

C. Title 18, United States Code, Sec. 2314 Interstate Transportation of Stolen Property on 2-2-70.

4. That on the 1st day of July, 1972, the defendant-appellant was found guilty to the aforesaid indictment by a jury in the within cause.

5. That on the 28th day of September 1972, the defendant-appellant MILTON SILVERMAN, was sentenced by the Honorable Damon Keith to Custody of the Attorney General ( ) Prison for the period of 5 years Count I,—8 years Count 4 & 5 concurrent, Sec. 4208(2); Sam Norber, sentenced to a term of Five years imprisonment.

6. That defendant-appellant is now on Bail pending appeal herein.

7. That defendant-appellant herein appeals to the United States Court of Appeal for the Sixth Circuit from the above stated judgment.

/s/ Milton Silverman
Defendant-Appellant

/s/ Noel L. Lippman
Attorney for Defendant-Appellant,
Milton Silverman
29400 Van Dyke Avenue
Warren, Michigan 48093
755-9600

Dated: September 28, 1972.

APPENDIX B

No. 73-1334
No. 73-1335
No. 73-1336
No. 73-1337

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

United States of America, *Plaintiff-Appellee.* v. Lee Stephens, *Defendant-Appellant.* United States of America, *Plaintiff-Appellee.* v. Alfonse Bartkus, *Defendant-Appellant.* United States of America, *Plaintiff-Appellee.* v. Milton Silverman, *Defendant-Appellant.* United States of America, *Plaintiff-Appellee.* v. Sam Norber, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

OPINION OF THE COURT OF APPEALS

Decided and Filed February 28, 1974.

Before: Phillips, Chief Judge; Celebrezze and Lively, Circuit Judges,

Lively, Circuit Judge. The four appellants and two others were jointly indicted for conspiracy to violate Title 18 U.S.C. §§ 2314, 2315 and 2 "by fraudulently and unlawfully transporting and causing to be transported in interstate commerce, goods and merchandise of a value exceeding $5,000 knowing the same to have been stolen, and receiving, storing, bartering, selling and disposing of goods and merchandise of a value exceeding $5,000 moving in interstate commerce, knowing the same to have been stolen." The indictment then described the part which each of the defendants allegedly played in the conspiracy and set forth a number of overt acts and the dates on which these acts were performed by various defendants. The indictment contained five counts relating to the alleged conspiracy, the various overt acts and charges of aiding and abetting. One defendant, Wayne Wakeford, was dismissed and a jury trial began on January 4, 1972 with the four appellants and one Robert "Bobby" Kahn as joint defendants. On February 9, 1972 this jury reported that it was unable to reach a verdict and was discharged. Prior to the commencement of the second trial the defendant Kahn pled guilty. On August 1, 1972 the jury returned a verdict finding the defendants Norber, Bartkus, Stephens and Silverman guilty as charged in count I of the indictment, Norber and Bartkus guilty under counts II and III and Silverman guilty under counts IV and V. The four appeals were consolidated and heard together in this court.

The goods which were stolen consisted of a truck-type trailer loaded with Bayer aspirin and other non-prescription drug products which was shipped from the Glenbrook Laboratories of Sterling Drug Company in Trenton, New Jersey to a distribution point at Chicago, Illinois on January 12, 1970. The shipment was by rail and it was proven that the trailer arrived at the Penn Central yard in Chicago.

The loaded trailer disappeared from the Penn Central yard in Chicago before it could be delivered to the consignee and the empty trailer was found on a street in Chicago on January 19, 1970. All of the aspirin was not recovered but cases of aspirin identified as being parts of the shipment were recovered from a truck driven by the defendant Silverman in Detroit, from a building identified as the Castle City Furniture Company in Detroit and from a discount store in Cincinnati whose manager testified that it had been purchased from the defendant Silverman. The testimony of Sal Caracappa, an independent trucker, provided important links in the chain of conspiracy.

Caracappa testified that he was contacted on January 20, 1970 by Bobby Kahn whom he had known for about 15 years and hired to run a load of stolen aspirin from Chicago to Detroit. He was told by Kahn that the stolen cargo would be in a legitimate trailer to be picked up at Middle West Freight Lines in Chicago on the morning of January 21. When Caracappa arrived at the appointed place and met with Kahn he checked the loaded trailer and found that it did contain Bayer aspirin. Kahn rode part of the way to Detroit with Caracappa, but left the truck before it arrived at its destination. Caracappa then drove on to Detroit and pulled into a truck stop which had been designated by Kahn and waited in a conspicious place. After a while a man identified by Caracappa as the defendant Stephens came to his truck and said, "I'm your man here in Detroit." Later in the evening of January 21 Caracappa was at the home of the defendant Stephens when four people arrived. These were identified as Bobby Kahn, a young woman named Marianna Soots, the defendant Norber and the defendant Bartkus. About 10:00 o'clock that night Caracappa overheard a conversation among the other men at Stephens' house concerning the ownership of

the cargo. He went back to his truck spent the night in the cab.

Caracappa then testified as to events which occurred on January 22 involving Norber, Kahn, Stephens and Bartkus. Before the day was over the trailer which Caracappa had brought from Chicago was unloaded at a warehouse near Fourth and Grand River in Detroit. The crew which unloaded the trailer was in the charge of Lee Stephens, and Kahn and Bartkus directed where the cartons which were taken from the trailer were to be placed on the second floor of the building. The witness testified that all four of the other men were involved in discussions concerning the unloading and placement of the cargo and that he saw Norber give an envelope containing money to Kahn. Thereafter Kahn paid Caracappa for hauling the goods. He also testified that he saw yellow slips of paper containing an inventory of the load while at Stephens' house and he positively identified the contents of the trailer as Bayer aspirin, Midol and related products.

The witness Wayne Wakeford was originally indicted with the appellants, but the charges against him were dismissed prior to the first trial. He was an employee of the fendant Silverman, who also did business as Scot Beauty Supply, and he testified to activities in which he, Silverman, Norber and Stephens were involved in moving smaller loads of Bayer aspirin in Detroit and from Detroit to Cincinnati, Ohio. The testimony of Wakeford related the movement of cases of aspirin to the Castle City Furniture storeroom and he also testified to a visit to the warehouse at Fourth and Grand River with Silverman at which time he saw 800 to 1,000 cartons of Bayer aspirin on the second floor. His testimony concerning the storage of Bayer aspirin at Castle City Furniture, meetings at Greenfield's Restaurant,

the visit to the warehouse at Fourth and Grand River and the delivery by Silverman of aspirin to a discount store in Cincinnati all verified previous testimony given by Detective Sergeant Hagstrom of the Michigan State Police who had conducted a surveillance of Silverman in January and February of 1970. On February 18, 1970 Silverman and Wakeford were arrested by Michigan authorities. Cases of Bayer aspirin were seized from a U-haul truck that they were driving at the time of their arrest and from the Castle City Furniture building all pursuant to a search warrant issued after their arrest. These were later identified as being included in a group of cartons introducted in evidence.

The general manager of the discount store in Cincinnati who had purchased two loads of aspirin from Silverman testified that they were offered to him at 18 to 20 per cent below cost. Some of the aspirin were sold immediately to a business known as Goldsmith operated in the same building with the discount store, and in turn portions of this purchase by Goldsmith were traced to two other wholesale druggists in the Cincinnati area. Some of the cartons of aspirin received by each of these four Cincinnati businesses were recovered by the FBI and introduced into evidence along with those taken from the U-haul truck and the Castle City Furniture storeroom. The labels had been cut from the boxes recovered in Cincinnati, which corroborated the testimony of Wakeford that the cases of aspirin which he hauled to the Castle City Furniture storehouse had had the labels cut.

Two employees of Glenbrook Laboratories testified. The witness Bannister was the shipping foreman at Trenton, New Jersey on the date the merchandise which eventually disappeared was loaded and dispatched. He described the use of control numbers by the manufacturer that served

to identify the particular batch from which each container of aspirin was manufactured. He stated that this control number appeared at two places on each carton of aspirin and that the cartons also contained consecutive numbers and that this information was noted on a withdrawal sheet as the cases of aspirin were loaded on the trailer. He introduced the withdrawal sheet, the bill of lading for the particular shipment which was later stolen and the control sheets which gave further information about each control item. He described in great detail the contents of the trailer, identifying the number of cases of aspirin and other products, broken down as to the size containers in each case. He further stated that the control number appears on each bottle and tin of Bayer aspirin in addition to appearing on the shelf carton in which they are enclosed and on the shipping case. The witness pointed out that some of the cartons were mixed cases. These were cartons which contained aspirin made from the last portion of one batch of ingredients and the first part of the next succeeding batch. These cases contained two sets of control numbers and were specially designated with a white sticker. The witness testified that it would be impossible for a box containing the numbers shown on the various shipping documents which were filed as exhibits to have gone to any destination except Chicago. He also stated that an empty shipping case later recovered could be identified as part of a particular shipment.

Edward Mannix testified that he was director of quality control at the Glenbrook Laboratories in Trenton, New Jersey both at the time that the stolen products were shipped and at the time he testified. He described the use of control numbers to identify batches of aspirin mix, corroborating the testimony of the witness Bannister. Mannix stated that after the FBI had recovered aspirin which it believed was stolen he went to the bonded warehouse where

it was stored and checked the control numbers and contents of each box, making a list as he went along. He identified cartons which had been brought to the courtroom by the prosecution as being those which he had checked either in the bonded warehouse or in the marshal's office, always in the company of FBI agents. He testified that cartons of products shown to him at the warehouse and in the marshal's office and exhibited to the jury were part of the shipment from Trenton to Chicago which disappeared. He stated that no two split cases of aspirin could ever be identical and that these could always be positively identified. Six such cartons were identified by the witness. An FBI agent named O'Neil testified to receiving 233 cases of aspirin and other Glenbrook products from the Michigan authorities and storing them in the bonded warehouse were Mannix examined them. He identified the cartons exhibited in the courtroom as being among those which had been in the possession of the FBI.

It would unduly extend this opinion to discuss every claim of error which the appellants have asserted in their briefs and in oral argument. The trial of the case consumed eight weeks and we have examined the transcript which consists of nearly 4,000 pages. While separate briefs were filed by the four appellants, each adopted many of the arguments in the briefs of the others and some of the alleged trial errors affected all of the defendants.

All four of the appellants were convicted of the conspiracy charge. The defendants maintain that it was error to submit this case to the jury as a "chain conspiracy," and that if the conspiracy issue was properly submitted at all, the evidence disclosed two separate conspiracies rather than a single one. Reliance is placed on *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), where the court refused to permit the prosecution to link together the activities of

two people as a conspiracy in the absence of evidence that there was a concert of purpose between them. In this case, however, according to Caracappa, when Bartkus and Kahn followed the stolen merchandise from Chicago to Detroit they met the same day with Norber at the Stephens residence. When the other alleged conspirators, Silverman and Wakeford, entered the picture four or five days later they were seen going to the residence of Norber and then to the warehouse at Fourth and Grand River where the stolen merchandise had originally been unloaded and stored. The defendant Norber is thus shown to have been in contact with Bartkus and Kahn immediately upon their arrival in Detroit, to have been involved in the unloading and storage of the merchandise in that city and to have been in contact with Wakeford and Silverman at the time of the removal of part of the shipment to the Castle City Furniture storeroom. It is not necessary that each member of the conspiracy be a member of it from the beginning so long as each joins it while it is still in operation. *United States v. Jackson,* 422 F.2d 975 (6th Cir. 1970). We do not believe that the conspiracy ended, as a matter of law, when Bartkus and Kahn delivered the merchandise to Norber and Stephens. The jury was properly permitted to consider whether the actions of all the named conspirators were in furtherance of a single plan to transport and dispose of interstate merchandise which they knew to have been stolen. Possession by one of goods shown to have recently been stolen is sufficient to make a prima facie case that the person in possession knew of the stolen nature of the goods. *Barnes v. United States,* 412 U.S. 837 (1973); *United States v. Winbush,* 428 F.2d 357 (6th Cir.), *cert. denied,* 400 U.S. 918 (1970). We believe that the circumstantial evidence of involvement in the charged conspiracy by each of the four appellants is sufficient to support the jury verdict. *Schwachter v. United States,* 237 F.2d 640 (6th Cir. 1956).

All of the defendants objected to the admission in evidence of the cartons of aspirin and other products seized by the officers in Detroit and Cincinnati. The basic claim was that these cartons were not properly identified as being part of the stolen shipment. The trial judge correctly ruled that the exhibits in question should be received. The witness Mannix positively identified six of the cartons as being part of the shipment from Trenton to Chicago and he and the witness Bannister confirmed that the other cartons and their contents contained control numbers which were the same as those appearing on other items in the stolen shipment. Both of these witnesses were subjected to vigorous cross-examination intended to cast doubt on the identification of these very exhibits. The principles enunciated by this court in *United States v. Langley,* 466 F.2d 27 (6th Cir. 1972), are controlling. It is immaterial that the government was not able to recover and produce all of the merchandise from the stolen shipment or that all of it could not be positively identified in the same way as the six mixed cases. The evidence discloses a sufficient identification of the stolen merchandise, detailed testimony of surreptitious movement of large quantities of the same kind of merchandise and the ultimate recovery of merchandise bearing identifying numbers which coincided with those known to have been affixed to portions of the stolen shipment. From all of this evidence the jury could reasonably infer that the cartons of aspirin and other products recovered from Silverman and Wakeford and those who purchased from them were part of the stolen shipment. A case with many features similar to this one in which the same result was reached is *United States v. DeKunchak,* 467 F.2d 432 (2d Cir. 1972).

An issue raised by several of the appellants concerns the failure of the prosecution to produce Bobby Kahn as a

witness. At the time of the second trial, Kahn had pled guilty to several of the charges in the indictment upon which appellants were tried and was awaiting sentencing. When Caracappa was first asked to relate a conversation between him, Kahn and Bartkus, the defendants objected on the ground that they would be denied their right of confrontation unless the government planned to produce Mr. Kahn as a witness. One of the prosecuting attorneys responded that defense counsel knew that the government could not call Mr. Kahn to the witness stand in the case.[1] Later a motion for mistrial was based on this statement of the prosecutor and lengthy arguments were had as to whether the government could call Kahn as a witness and whether he could exercise a Fifth Amendment right to remain silent after having pled guilty. The court denied the motion for mistrial and asked the parties to brief the question. We believe the court correctly ruled on the motion for mistrial since the single comment of the prosecutor concerning the government's ability to require Kahn to testify was not prejudicial in the entire context of the proceedings. This does not dispose of the matter, however. Late in the trial the prosecuting attorney announced that the government proposed to call Robert Kahn as its next witness. The court had previously appointed an attorney to advise Mr. Kahn of his rights in the event either side should call him. This was the same attorney who had represented Kahn at the first trial. This attorney informed the court that he had advised Kahn that he had an absolute right to refuse to testify and that it would be a violation of his Fifth Amendment rights to call him as a witness. The court then indicated that the government could not

[1] The basis for this assertion is unclear. Kahn had pled guilty to the charges against him and was not on trial.

call Kahn as a witness. There was no request that Kahn be granted immunity.

The statement by Caracappa that Kahn told him that his cargo would be stolen aspirin was clearly hearsay. Having admitted this testimony as the statement by one of the co-conspirators made in furtherance of the conspiracy the court erred in denying Bartkus the right to confront and cross-examine Kahn. *Chambers v. Mississippi,* 410 U.S. 284 (1973). While Kahn's guilty plea to the federal charges did not deprive him of the right to assert his Fifth Amendment privilege against incrimination on any possible state charge, nevertheless he should have been required to take the witness stand and assert the privilege in response to particular questions. *United States v. Seavers,* 472 F.2d 607 (6th Cir. 1973). Then if Kahn refused to answer questions about his alleged statement to Caracappa that the aspirin was stolen, the court had the responsibility to determine whether an answer could be required. Since the government created the situation by electing to introduce hearsay rather than direct evidence from Kahn that the aspirin was stolen, it ran the risk that Kahn would endanger the prosecution by refusing to testify and corroborate Caracappa. It could have offered Kahn immunity, but chose not to. Nevertheless Kahn's assumed Fifth Amendment right, which was improperly invoked by a refusal even to be sworn as a witness, could not be used as a means of depriving Bartkus of his Sixth Amendment right to confront and cross-examine his accuser. *Douglas v. Alabama,* 380 U.S. 415 (1965). Although the other appellants have claimed prejudice, we find that Bartkus was the only one whose fundamental rights were affected by the court's ruling.

Another Fifth Amendment issue arose when Caracappa refused to answer certain questions on cross-examination.

One such question concerned the identity of the person to whom he had sold three cases of aspirin which he testified he stole from the trailer between Chicago and Detroit. However, there was no objection to his refusal to answer this question and it is not before us. The other questions which Caracappa refused to answer on Fifth Amendment grounds related to a different load of aspirin which he hauled in 1970. It was apparently the theory of the defense that he had confused this load with the one which he hauled on January 21 of the same year. The appellants maintain that the entire testimony of a key prosecution witness should be stricken if he refuses to answer questions upon cross-examination. This question was carefully considered in *United States v. Cardillo,* 316 F.2d 606 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963), where the court held that there are three categories of testimony which require different action by the trial court when there is a refusal to submit to cross-examination. If the answer sought would have been so closely related to the crime for which the defendants were being tried, that the defendants may be substantially prejudiced by being deprived of their right to test the truth of the witness' direct testimony, the entire testimony of the witness should be stricken. If the subject matter of the testimony is connected with only a part, but not all, of the case being tried, a partial striking of the witness' testimony might suffice. The third category consists of testimony involved in collateral matters or cumulative testimony concerning credibility. The refusal of a witness to submit to cross-examination on such matters as these does not require that any testimony be stricken, but can be handled by a charge to the jury. See *Fountain v. United States,* 384 F2d 624 (6th Cir. 1967), *cert denied sub nom., Marshall v. United States,* 390 U.S. 1005 (1968).

The general rule is that a witness who has testified to incriminating matters on direct examination has waived tht privilege as to those matters and may not decline to answer on Fifth Amendment grounds when cross-examined. *Rogers v. United States*, 340 U.S. 367 (1951). The basic inquiry in a situation such as is presented here is whether there has been an adequate confrontation between the accused and the accuser to satisfy the confrontation clause of the Sixth Amendment. *Dutton v. Evans*, 400 U.S. 74, 97 (1970), (concurring opinion of Mr. Justice Harlan). An examination of the transcript reveals that Caracappa was carefully and intensely cross-examined about every detail of his testimony concerning his meeting with Kahn and Bartkus, the movement of the aspirin from Chicago to Detroit and his observations of the activities which took place after his arrival at Detroit.

The questions in response to which he invoked the Fifth Amendment concerned an entirely unrelated trip which he had purportedly made. At best this was a collateral matter, not directly connected to the transactions for which the defendants were being tried. As such, it was clearly within the discretion of the court to decide whether the invocation of the Fifth Amendment and refusal to answer questions on cross-examination required that the entire testimony of the witness be stricken. We find no abuse of discretion in the court's ruling in this regard. If the purpose of this cross-examination was to cast doubt upon the credibility of Caracappa, it was cumulative evidence. There was no effort by the government to conceal Caracappa's past or current troubles with the law, and counsel for the defense availed themselves of numerous opportunities to remind the jury of the flawed character of the chief witness for the prosecution.

A related claim of error concerns the court's refusal to make available to the defendants the grand jury testimony of Caracappa concerning the prior transportation of a load of aspirin. This again was a matter not directly related to the transactions involved in the conspiracy for which the defendants were being tried. The Supreme Court has held that the right to have access to the grand jury testimony of a trial witness is based on a showing of "particularized need." *Dennis v. United States,* 384 U.S 855 (1966). In *Dennis* the Court cautioned that it is especially important in conspiracy cases that all information which may lead to the truth be made available. A request for the grand jury testimony of a trial witness is addressed to the discretion of the trial court. *United States v. Johnson,* 414 F.2d 22 (6th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); *United States v. Luxenberg,* 374 F.2d 241 (6th Cir. 1967). We conclude that in the present case the defendants failed to show a particularized need for the requested transcript and that the trial judge did not abuse his discretion or close an avenue to the truth in denying their request.

The witness Caracappa created another issue when he falsely answered on cross-examination that his home at the time of trial was Kansas City. At the first recess following this testimony one of the prosecuting attorneys advised defense counsel and the court that this was not a true statement and that Caracappa was attempting to keep his present location hidden. At the same time the prosecuting attorney offered to recall Caracappa so that the matter could be explored in the presence of the jury. The defense declined to agree to his recall to the witness stand in view of the statement by the prosecuting attorney that he would ask Caracappa to explain the reason for giving a false answer. We have held that the prosecution may not know-

ingly suborn false testimony or suppress exonerating evidence. *United States v. Young,* 426 F.2d 93 (6th Cir.), *cert. denied,* 400 U.S. 828 (1970). It is established that a witness may be asked his residence on cross-examination. The purpose of this is to learn of his community identification so that other evidence may be sought concerning his reputation for veracity. *Alford v. United States,* 282 U.S. 687 (1931). In view of the fact that Caracappa had recently left Chicago and would not have likely established a reputation in his new domicile and the fact that his general character was so fully explored in the trial, we do not believe that his false answer produced prejudicial error. This is particularly true since the government immediately disclosed the fact of its falsity to the court and defense counsel and offered to bring the witness back to the stand for further cross-examination.

It is contended that the trial court abused its discretion in permitting the prosecution to cross-examine and impeach the witness Wakeford who had been called by the government. The problem is that the defendants opened the door to this particular action by asking Wakeford on cross-examination whether he had any reason to believe, at the time he was involved in movement of the aspirin with the defendant Silverman, that the cargo was stolen. This question did not relate to any testimony on direct examination and the prosecutor claimed that the negative answer of Wakeford took him by surprise. He was then permiteted to question Wakeford as if under cross-examination with respect to a meeting between Wakeford, the prosecuting attorney and an FBI agent named O'Neil. When Wakeford denied that he had made a statement to the prosecuting attorney and FBI agent that he believed the aspirin was stolen, agent O'Neil was called and permitted to testify that Wakeford had made such a statement in his

presence in the presence of the prosecutor. If the purpose of getting this testimony before the jury had been to prove the conspiracy, it would have been improper. *United States v. Sherfey,* 384 F2d 786 (6th Cir. 1967). Any statement of Wakeford after the charged conspiracy had terminated would not be admissible to prove either the conspiracy or any substantive offense. However, it is clear from the context that agent O'Neil was permitted to testify solely for the purpose of impeaching the testimony of the witness Wakeford and the jury was so advised in the charge. In view of the fact that the subject of Wakeford's knowledge or state of mind at the time of the transactions which he testified to was first raised by the defendants, it was not error to permit impeaching testimony following a claim of surprise by the prosecution.

The defendants contend that the trial court committed two errors in its application of the Jencks Act, 18 U.S.C. § 3500. The first incident again related to portions of Caracappa's grand jury testimony which concerned a different transcript and Caracappa's FBI statemtnt relating to the was an FBI statement which had been taken from Coracappa. The prosecuting attorney advised the court that he had given to defense counsel the portions of the grand jury transcript and Caracappa's FBI statement relating to the charges which were then being tried. The remainder of the grand jury transcript of Caracappa's testimony and the FBI statement were furnished to the trial judge for an *in camera* inspection. That is, the portions relating to the charges then on trial were turned over to the defense and the entire statement was handed to the court for an *in camra* inspection. We find no abuse of discretion in the decision of the trial judge in denying the request of the defendants that the entire grand jury transcript and complete FBI statment be delivered to them. The Supreme Court has

said that application of the Jencks Act depends on the good sense and experience of trial judges subject to "appropriately limited review of appellate courts." *United States v. Augenblick,* 393 U.S. 348, 355 (1969). Our examination of the proceedings indicates that the defendants in this case were probably furnished with more material than is actually required by the Jencks Act. The court properly held that the additional requested material was not required to be furnished.

The other alleged Jencks Act error related to the refusal of the court to strike the testimony of officers who admitted that they had destroyed notes which had been made at the time of a surveillance about which they were testifying. The Jencks Act applies to a "substantially verbatim recital" of an oral statement by a witness and does not apply to an officer's rough notes. *United States v. Augenblick, supra.* This court has held that when an agent destroys his rough notes of an interview with a person after using the notes to write a statement or report, it is not error to permit the agent to testify. *United States v. Lane,* 479 F.2d 1134 (6th Cir. 1973); *United States v. Hensley,* 374 F.2d 341 (6th Cir.), *cert. denied,* 388 U.S. 923 (1967); *United States v. Fruchtman,* 421 F.2d 1019 (6th Cir.), *cert. denied,* 400 U.S. 849 (1970). The defendants rely upon *United States v. Lonardo,* 350 F.2d 523 (6th Cir. 1965), but this case does not apply because of a basic factual difference. In *Lonardo,* a government agent deliberately destroyed a stenographic transcript of an interview with a witness and there was evidence of a vital discrepancy between the destroyed transcript and the final statement which was furnished.

Several complaints are made about the charge given to the jury by the court and the refusal of the court to give certain requested instructions. The defendant Bartkus requested an instruction that the relationship of buyer and

seller, in the absence of an understanding beyond the mere sales agreement, does not prove a conspiracy to deal in stolen property even if both parties know of the stolen character of the goods. The language of the requested instruction is from *United States v. Varelli,* 407 F.2d 735 (7th Cir. 1969) quoting from an earlier Seventh Circuit case. While not disputing the fact that there may be a transaction between a buyer and seller involving goods which both know are stolen without the existence of a conspiracy, we do not believe that such an instruction was necessary in this case. The court very carefully recited the elements required for a finding of conspiracy and membership in the conspiracy by any of the defendants, and in following these instructions the jury could not have found a defendant guilty unless it believed beyond a reasonable doubt that he was part of the overall conspiracy and not just a purchaser or seller of stolen goods. The buyer-seller theory was fully developed by counsel and the requested instruction was not required in order for the jury to be properly charged with respect to the findings it was required to make in determining the innocence or guilt of the defendants. When considered as a whole, the jury charge in this case fairly and accurately stated the law applicable to the charges for which the defendants were being tried. *United States v. Andrews,* 347 F.2d 207 (2d Cir.), *cert. denied,* 382 U.S. 956 (1965).

It is necessary to consider separately one other allegation of trial error. The transcript reveals the following dialogue which occurred during the direct examination of the witness Caracappa:

> Q. Incidentally, I think—well, let me ask you this—is this the first time that you had met Mr. Bartkus?
>
> A. Yes.
>
> Q. And was Mr. Bartkus introduced to you in any particular way?

A. I was reluctant to talk to Mr. Kahn in front of Mr. Bartkus and he was introduced—

Mr. Zanglin: I object.

Mr. Rosenthal: Objection as not responsive, your Honor.

The Court: The court will sustain the objection.

Q. (By Mr. Kelley, continuing) Did Mr. Kahn introduce Mr. Bartkus to you in some way?

A. Yes, he did.

Q. What did he say?

A. He said, you can do business in front of this man.

Q. Did he describe Mr. Bartkus in any particular way?

Mr. Chandler: I object again, your Honor, on the grounds there is no opportunity for a confrontation of Mr. Kahn in this matter, unless he is called as a witness.

Mr. Kelley: Well, that is the same objection, if the court please, and I think your Honor has ruled on it.

The Court: All right. You may proceed.

Mr. Chandler: I would further say, your Honor, that the description Mr. Kahn gives of Mr. Bartkus is pure hearsay and could not be in any way in furtherance of the conspiracy.

Q. (By Mr. Kelley, continuing) Did he introduce him in any particular way, Mr. Caracappa?

A. Yes, he did.

Q. What did he say?

A. He said he was a buyer of stolen merchandise.

Q. All right. Was there at that time—we are still talking about—

Mr. Chandler: Your Honor, I would ask the jury be excused.

In argument which followed out of the presence of the jury the prosecution sought to justify its introduction of the statement which characterized the defendant Bartkus as a buyer of stolen merchandise on several grounds. It was claimed that the statement was made in the presence of Bartkus and therefore could be used in his trial, and it was further contended that the testimony of Caracappa was admissible as a statement made by a co-conspirator in furtherance of the conspiracy. Bartkus took the position that the statement was introduced as evidence of his character and that the rule against the introduction of such evidence in a criminal case is absolute. On appeal Bartkus principally relies upon *Michelson v. United States,* 335 U.S. 469 (1948), in which the Supreme Court said:

> "Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." At 475-476.

This universally recognized rule has often been applied by this court. See, e.g., *United States v. McCarthy,* 470 F.2d 222 (6th Cir. 1972).

The government maintains that this testimony falls within a recognized exception to the general rule set forth in *Michelson v. United States, supra.* The purpose of the

statement by Kahn to Caracappa, it is asserted, was to assure Caracappa that it was safe to discuss the transportation of the stolen goods in the presence of Bartkus, and the movement of the stolen merchandise was necessary to the success of the conspiracy. It is the position of the government that relevant evidence of a fact or statement done or made in furtherance of the conspiracy is not inadmissible because it incidentally discloses criminal conduct on the part of a defendant. Reliance is placed on cases which permit such evidence to show a pattern of conduct. E. g., *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949). *We do not believe the evidence that Bartkus engaged in other criminal activities on other occasions came within any exception to the Michelson rule. Such evidence is extremely damaging and the prejudice cannot be removed even by curative instructions. United States v. Rudolph, 403 F.2d 805, 807 (6th Cir. 1968). As with the reference to the aspirin being stolen, this error related only to Bartkus and the rights of the other defendants were not affected by it.*

We have considered the other issues raised in the briefs and arguments of the defendants, including the allegation of a defective search warrant, and find them to be without merit. This was a difficult case for the district court. Although it had been agreed that the objections and statements of counsel for one defendant would be received as applying to all, there were repeated instances when all four attorneys addressed the court on a single point. Nevertheless, District Judge Damon J. Keith consistently treated everyone with courtesy and patience. He ruled promptly when required to do so and reserved rulings in instances where this did not delay the trial and further research by the attorneys appeared desirable. With the exception of those matters relating to the defendant Bartkus which are

set forth herein, we have found no prejudicial error in the conduct of the trial. It is therefore ordered that the judgments of the district court in No. 73-1334 (Lee Stephens), No. 73-1336 (Milton Silverman) and No. 73-1337 (Sam Norber) are affirmed and the judgment in No. 73-1335 (Alfonse Bartkus) is reversed and that the appellant Bartkus be granted a new trial.

APPENDIX C

No. 73-1336

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

United States of America
Plaintiff-Appellee
v
Milton Silverman
Defendant-Appellant

ORDER

(Filed April 5, 1974)

Before: Phillips, Chief Judge; and Celebrezze and Lively, Circuit Judges.

The defendant-appellant filed a petition for rehearing with a request for rehearing in banc. No judge of this court having moved for a rehearing in banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the court being advised, it is Ordered that the petition for rehearing be denied.

Entered By Order of the Court
/s/ John P. Hehman
Clerk

APPENDIX D

State of Michigan,
County of Oakland—ss

AFFIDAVIT FOR SEARCH WARRANT

(February 19, 1970)

Robert Hagstrom, affiant, being first duly sworn, deposes and says:

That the affiant is employed as a detective with the Michigan State Police and that the affiant has continually been employed with the Michigan State Police for the past fifteen (15) years.

That the affiant has reason to believe and does believe that there is now being concealed certain property, to-wit: approximately 200 cartons of Bayer Asprin and Vanquish, which were part of a shipment of Bayer products that were hijacked January 15th, 1970 between 8:00 A.M. and 11:00 P.M. from the Penn Central terminal located at 361 W. 47th Street, Chicago, Illinois by an unknown subject, by removing the entire trailer. The trailer was recovered empty in the 500 block of Lumber Street, Chicago, Illinois, January 19, 1970.

Glenbrook Laboratories, Trenton, New Jersey, is the consignor on all shipments of Bayer products to the midwest. This particular shipment had not yet reached the Glenbrook Laboratory Warehouse at Evanston, Illinois.

Mr. Lance Penney, district sales manager for Glenbrook Laboratory advises that once the products reached the warehouse and are being prepared for shipment to indi-

viduals, wholesalers or retailers, their names are stenciled in on each carton. (For example, Cunningham Drug Company, Detroit, Michigan, orders 5,000 cartons of Bayer asprins. The Glenbrook Laboratory, Evanston, Illinois would stencil the Cunningham Drug Company and address on each of the 5,000 cartons.) Mr. Penney advises that should a shipment not reach the Evanston, Illinois warehouse as in this case, there would be no stenciling on the cartons.

On January 26, 1970, your affiant states that his partner, Lloyd Bushor, observed approximately 50 cases of Bayer Asprin being loaded into a 1961 dark green Ford van, license number 1969 Michigan 5311 EN, owned by Scott Incorporated, owned by Milton Silverman, d/b/a Scott Incorporated.

Your affiant further states that Lloyd Bushor did not see any markings on these cartons which would indicate a consignee, and further, that these cartons were being taken from the rear exit of the Castle City Furniture Company, located at 14494 East Eight Mile Road, Detroit, Michigan, through an overhead door.

Your affiant further states that he and the other officers of the Michigan State Police and the Michigan Department of Treasury conducted a physical surveillance on the above described van, from point of loading to Save Discount, 41 E. Court Street, Cincinnati, Ohio. 116 cartons of Bayer products were observed to be unloaded at the aforementioned location and carried in the premises at approximately 7:00 A.M. on January 27, 1970.

Your affiant further states that Mr. Ted Davis, manager of Save Discount Company, Cincinnati, Ohio, stated to agents of the F.B.I., that he had purchased over 100 cartons of Bayer aspirin from Milton Silverman, Scott Barber & Beauty Company, 20 S. Main Street, Clawson, Michigan,

on January 27, 1970. Davis said he had been buying drugs periodically from Silverman for approximately ten years. Davis admitted that he had received approximately a 20% discount below wholesale price.

F.B.I. agents observed two remaining cartons of this shipment on January 29, 1970, could locate no consignee stenciled on any part of the carton, nor could they locate any other numbers other than the Glenbrook Laboratory code number 112-A, nor did these cartons contain a date code batch number immediately after the code number, which Mr. Penny advises are stamped on the cartons at the time of manufacture.

Your affiant further states that Mr. Lance Penney advises, through his knowledge of the industry, that Milton Silverman is not known to be a purchaser of products from the midwest branch of Glenbrook Laboratory, and is not known to be a dealer in drugs.

Affiant further states that on February 18, 1970, your affiant and other officers of the Michigan State Police, F.B.I. and Michigan Department of Treasury conducted a physical surveillance at the Castle City Furniture Company, 14494 E. Eight Mile Road, Detroit, Michigan. Mr. Lloyd Bushor, while he was standing on a public sidewalk adjacent to the said furniture company, observed one John Logan loading cartons of Bayer products into a Ford U-Haul van, Kentucky license number 1969, R13-784, at approximately 3:00 P.M. Subsequent physical surveilance revealed Wayne Paul Wakeford drove the above described truck away from the furniture store to South Oakland Rentals, 11 Mile and Denton, Madison Heights, Michigan, where the truck was locked and left overnight. The truck was kept under surveillance until 11:31 A.M., February 19,

1970, at which time the truck was observed being driven away to a location in front of 626 Lincoln, Madison Heights, Michigan. At 11:38 A.M. surveilling officers stopped Milton Silverman and Wayne Wakeford in the truck, where they were placed under arrest and charged with possession of stolen property.

Robert Hagstrom

Subscribed and sworn to before me, this 19th day of February, 1970.

....
Municipal Judge in and fo. the City of ....., County of Oakland, State of Michigan.

APPENDIX E

State of Michigan,
County of Oakland—ss

SEARCH WARRANT

(February 19, 1970)

To the Sheriff Or Any Peace Officer Of Said County:

The attached Affidavit, having been sworn to by the affiant, Robert Hagstrom, before me this day, based upon the facts stated therein, probable cause having been found, in the name of the People of the State of Michigan I command that you enter the following described places: Ford U-Haul van truck, bearing 1969 Kentucky license number R13-784, located in front of 626 Lincoln, Madison Heights, Michigan; and Castle City Furniture Company building located at 14494 E. Eight Mile Road, Detroit, Michigan; therein to search for, seize, secure, tabulate and make return according to law the following property and things:

Glenbrook Laboratory products and Bayer products.

Issued Under My Hand this 19th day of February, 1970.

.....
Municipal Judge in and for the City of ....., County of Oakland, State of Michigan.

APPENDIX F

73-1336-7

Office Of The Clerk
UNITED STATES COURT OF APPEALS
For The Sixth Circuit
Cincinnati, Ohio 45202

ORDER

April 26, 1974

Mr. James D. O'Connell
13818 Woodward Avenue
Highland Park, Michigan 48203

Re: United States of America, Plaintiff-Appellee,
vs.
Milton Silverman and Sam Norber, Defendants-Appellant.
Case Nos. 73-1336 & 73-1337

Dear Mr. O'Connell:

Please be advised that an order was entered today staying the issuance of mandate in this case for thirty (30) days from this date, pending the filing of petition for writ of certiorari.

Yours very truly,

John P. Hehman, Clerk
/s/ Grace Keller
Chief Deputy

cc: Ralph B. Guy
United States Attorney
817 Federal Building
Detroit, Michigan 48226

Mr. Victor D. Stone
Criminal Division
Dept. of Justice
Washington, D.C. 20530